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SLIM'S PLAYGROUND: TELMEX'S MONOPOLY OF THE TELECOMMUNICATIONS INDUSTRY IN MEXICO

*Maria Fernanda Aceves**

I. INTRODUCTION

CARLOS Slim, currently the number one billionaire in the world according to Forbes,¹ presently owns Telefonos de Mexico (Telmex) and América Móvil, which are the two large companies dominating the Mexican telecommunications market today.² Furthermore, Telmex owns 90 percent of the landline industry in Mexico while América Móvil serves “over 200 million wireless customers” throughout Latin America making it “the largest mobile phone carrier in Latin America.”³ Some point to such metrics as proof that Slim—whose estimated fortune at \$68.5 billion is nearly 4 percent of Mexico’s annual economic output—is a monopolist.⁴

While anti-competitive provisions have been instilled since the founding of Mexico through the Constitutions of 1856 and 1917,⁵ the Mexican government has indirectly endorsed the monopoly by prohibiting foreign investment through inhibiting the activity and participation of foreign investors.⁶ The Mexican government has also undermined the efforts of the Federal Commission of Telecommunications, the regulatory agency in charge of regulating telecommunications in Mexico.⁷ The Federal Commission of Telecommunications (Cofetel) is governed by the Federal Law

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1. *The World's Billionaires*, FORBES, (Mar. 4, 2013), <http://www.forbes.com/billionaires/>.

2. Brian Greene, *Carlos Slim Named World's Richest Man*, U.S. NEWS (March 5, 2012), <http://www.usnews.com/news/articles/2012/03/05/carlos-slim-named-worlds-richest-man>.

3. *Id.*

4. *Id.*

5. Gabriel Castañeda, *Mexico's Competition Regime: Walking the Walk, Slowly*, 6 NO. 1 COMPETITION L. INT'L NO. 1, 2010 at 37.

6. Frederick V. Perry, *The Foreign Investment Transaction in Mexico*, 8 LOY. L.A. INT'L & COMP. L. REV. 67, 67 (1985).

7. *Información General*, COMISIÓN FEDERAL DE TELECOMUNICACIONES, <http://www.cft.gob.mx:8080/portal/informacion-general/> (last visited May 19, 2013).

of Telecommunications instituted in 1995.⁸ In addition to the Federal Law of Telecommunications, Mexico has instituted two other statutes on competition which were never enforced “due to the overwhelming role of designated state monopolies, price controls and complex regulatory web.”⁹

Furthermore, the lack of enforcement concerning Mexico’s anti-trust laws has caused tensions between Mexico and other countries. For example, the United States filed a panel report which resulted in the World Trade Organization finding that Mexico violated its GATS commitments by failing to adopt anti-competitive measures and failing to provide reasonable access to cross-border telecommunications suppliers.¹⁰

II. THE HISTORY OF TELMEX AND AMÉRICA MÓVIL

The modern Mexican telecommunications industry began in 1947 when Telefonos de Mexico (Telmex) was created through the acquisition of two international telephone companies that were active in Mexico, L.M. Ericsson and the International Telegraph Corporation.¹¹ Once the private company merger was complete, the Mexican government imposed a telephone service tax on long-distance telephone calls to supply revenue for the addition of telephone lines around the country in order to compete competently with the United States and other countries in the communications field.¹² Hence, in 1972 the Mexican government’s role transitioned from cooperating greatly with Telmex to owning the majority of the company when it purchased 51 percent of Telmex shares.¹³ During 1984 Mexico faced a severe debt crisis which was addressed by the Madrid administration through the cutting of government expenditures and introducing minor privatizations.¹⁴

More drastic market reforms were instituted by the Salinas administration especially with regards to the privatization of Telmex, one of the largest state-owned enterprises in Mexico.¹⁵ Salinas had several reasons for instituting the privatization of Telmex which included demonstrating to the international community and foreign investors that Mexico believed in competition and a free market, increasing Telmex’s efficiency without political bureaucracy, and, lastly, helping Mexico’s debt by the

8. Ley Federal de Telecomunicaciones [Telecommunications Law], *as amended*, Diario Oficial de la Federacion [DO], 7 de Junio de 1995 (Mex.).

9. Castañeda, *supra* note 5, at 37.

10. Panel Report, *Mexico—Measures Affecting Telecommunications Services*, ¶ 8.1(c)-(d), WT/DS204/R (April 2, 2004).

11. *Telefonos de Mexico S.A. de C.V. History*, FUNDING UNIVERSE, <http://www.fundanguniverse.com/company-histories/telefonos-de-mexico-s-a-de-c-v-history/> (last visited May 19, 2013).

12. *Id.*

13. *Id.*

14. Luigi Manzetti, *Are You Being Served? The Consequences of Telmex Monopolistic Privatization*, 16 L. & BUS. REV. AM. 781, 785 (2010).

15. *Id.* at 785-786.

selling of the government's shares in the company.¹⁶ In 1990, Telmex began accepting bids from private investors which ended with Carlos Slim, owner of Grupo Curso, winning the bid.¹⁷ Furthermore, Slim had formed a partnership with Southwestern Bell and France Telecom prior to winning the Telmex bid because he believed that both companies had the knowledge and technological innovations crucial to bolster Telmex into a powerful telecommunications company while he had the political connections necessary to strengthen Telmex.¹⁸

Concerning Slim's political connections, he had been instrumental in the NAFTA negotiations as well as a staunch supporter of the Salinas administration and the PRI.¹⁹ Hence, Slim's political associations paid off when he acquired Telmex in addition to a seven year monopoly with respect to international and domestic telephone calls.²⁰ In addition, the Mexican government did not create a regulatory agency to regulate the Telmex monopoly nor did it follow Mexico's anti-competition laws located in the Constitution.²¹ Essentially, Telmex was granted a monopoly for seven years in the international and domestic areas of telecommunications in addition to assurances for investment and pricing.²² Thus, Telmex remained an unregulated monopoly with the exception of "the enforcement of the concession by the Secretaria de Comunicaciones y Transportes (Secretary of Communications and Transportation (SCT))."²³

As a result, the "Ley Federal de Telecomunicaciones" (Federal Telecommunications Law)²⁴ was implemented to establish a private and competitive market in the area of telecommunications and to create a regulatory structure during the Telmex monopoly.²⁵ Furthermore the Federal Telecommunications Law was established to resolve difficulties in telecommunications such as the restrictions on the amount of companies in the telecommunications area, the lack of division of the market, the ability of various network operators offering all the services their companies could support, and the necessity of "technical plans for the interconnection in non-discriminatory terms."²⁶

16. FUNDING UNIVERSE, *supra* note 11.

17. Manzetti, *supra* note 14, at 788.

18. FUNDING UNIVERSE, *supra* note 11.

19. Manzetti, *supra* note 14, at 788.

20. *Id.*

21. *Id.*

22. Roger G. Noll, *Priorities in Telecommunications Reform* 2-3 (Stanford Inst. for Econ. Policy Research, Discussion Paper No. 06-035, 2007), available at <http://www.stanford.edu/group/siepr/cgi-bin/siepr/?q=system/files/shared/pubs/papers/pdf/06-35.pdf>.

23. *Id.* at 3.

24. Ley Federal de Telecomunicaciones, *supra* note 8.

25. Noll, *supra* note 22, at 3.

26. Jana Palacios Prieto, *Telecommunications Industry in Mexico: Performance and Market Structure Analysis, and Conflicts of Interest Prevailing Between Operators and Authorities*, MEXICAN INSTITUTE FOR COMPETITIVENESS, 7 (May 16, 2011), http://imco.org.mx/images/pdf/Telecomm_Mexico_May_2011_-_Final_Version1_.pdf.

The Federal Telecommunications Law also currently governs the Comisión Federal de Telecomunicaciones (Federal Telecommunications Commission, also known as Cofetel) which was established by a presidential decree in 1996 as a regulatory body.²⁷ Unfortunately, Cofetel had great difficulty regulating the “incumbent former monopolist” Telmex due to Telmex’s political clout and economic power.²⁸ Another win for Telmex was that the Federal Telecommunications law implemented strict investment guidelines on emerging competitors, prohibited foreign investment, and awarded Telmex with significant network rents.²⁹ Consequently, most consumers selected to use Telmex services due to the wide array of services offered as compared to small forthcoming competitors that offered limited services and were forced to use the Telmex network.³⁰

Concerning the cell phone industry, Slim realized the importance of the growing market and concurrently won the bid for Radiomóvil Dipsa in 1990 when he bid for Telmex.³¹ As a result, the popular brand Telcel emerged from Radiomóvil Dipsa.³² Furthermore, Telcel emerged as a strong competitor in the mobile telephone sector in the 1980s due to two significant advantages.³³ First, it was the only telephone company that could offer mobile telephone services to customers in the entire country; second, Telcel had access to buildings and locations owned by Telmex that allowed Telcel to cultivate its wireless network throughout the country.³⁴ In addition, Iusacell was the dominant leader in the cell phone market prior to the entrance of Telcel but Iusacell had great difficulty competing with Telcel due to Telcel’s initial advantages.³⁵ Consequently, Telcel managed to acquire 70 percent of the market share of mobile phone carriers.³⁶ In an attempt to regain control of the mobile phone market, Grupo Salinas bought Iusacell in 2005 with the hopes of competing with Telcel.³⁷ Unfortunately, that aspiration came to an end due to Telcel’s prominent market presence because of Telcel’s early advantages.³⁸ Currently, Telcel, owned by América Móvil, has expanded into the Latin American market infiltrating “Argentina, Colombia, Ecuador, and Guatemala.”³⁹

27. Noll, *supra* note 22, at 3.

28. *Id.* at 3.

29. Manzetti, *supra* note 14, at 789.

30. *Id.*

31. María Elena Gutiérrez Rentería, *Mexican Telecommunication Industry: Challenges and Opportunities in the Digital Age*, 4 J. SPANISH LANGUAGE MEDIA 55, 61 (2011).

32. *Biography*, CARLOS SLIM HELÚ, http://www.carlosslim.com/biografia_ing.html (last visited May 22, 2013).

33. Prieto, *supra* note 26, at 15.

34. *Id.*

35. *Id.* at 16.

36. *OECD Review of Telecommunication Policy and Regulation in Mexico*, ORGANIZATION FOR ECON. CO-OPERATION AND DEV., 9-12 (Jan. 12, 2012), <http://www.oecd.org/internet/broadbandandtelecom/49536828.pdf> [hereinafter OECD].

37. Prieto, *supra* note 26, at 16.

38. *Id.*

39. OECD, *supra* note 36, at 23.

III. ANTI-TRUST LAWS IN MEXICO

A. MEXICAN CONSTITUTIONAL PROVISIONS ON COMPETITION

Although Telmex and América Móvil have flourished due to monopolistic practices, anti-trust laws were set in place since the Constitution.⁴⁰ Yet the lack of constitutional enforcement occurred because of the role of appointed state monopolies, the regulation of prices, and “a complex regulatory web” which lasted for seventy years.⁴¹ Furthermore, the Mexican Constitution of 1917 includes an article solely dedicated to addressing monopolies.⁴² Specifically, Article 28 forbids the occurrence of monopolies and “monopolistic practices.”⁴³ The article further threatens to harshly punish manufacturers, business owners, service providers or individuals that inhibit free trade or competition and that raise their prices to exaggerated levels detrimental to consumers.⁴⁴ Conversely, the article allows the government to partake in certain monopolistic practices which include the following areas: the postal service, telegraphs, radiotelegraphs, petroleum, radioactive minerals, nuclear energy, electricity, satellite communications, railroads, and issues of national security just to name a few.⁴⁵

B. THE FEDERAL LAW ON ECONOMIC COMPETITION

Although anti-monopolistic notions were instilled in the Constitution, the history of modern anti-trust laws began with the creation of the Federal Law on Economic Competition (FLEC),⁴⁶ which was enacted in 1993.⁴⁷ The drafters of FLEC created the law to implement fair competition in the face of large state controlled monopolies, ignored guidelines, staunch barriers to entry into the market, and an assortment of “foreclosed economic activities.”⁴⁸ Specifically, the drafters attempted to instill the following eight objectives in FLEC: to endorse efficiency in the marketplace through the removal of the inability to allow social mobility, to guard competition to acquire lower prices and higher levels of innovation, to use free trade to avoid monopolistic actions, to reduce obstacles from allowing market entrants, to facilitate access to the market to endorse competition, to avoid ineffective price controls that inhibit the market, to allow intervention by a regulatory agency, and to uncover state created monopolies.⁴⁹

40. Castañeda, *supra* note 5, at 37.

41. *Id.*

42. Constitución Política de los Estados Unidos Mexicanos [C.P.], *as amended*, Diario Oficial de la Federación [DO] 5 de Febrero de 1917, art. 28 (Mex.).

43. *Id.*

44. *Id.*

45. *Id.*

46. Ley Federal de Competencia Económica [LFCE] [Federal Law on Economic Competition], *as amended*, Diario Oficial de la Federación [DO], 24 de Diciembre de 1992 (Mex.).

47. Castañeda, *supra* note 5, at 37.

48. *Id.*

49. *Id.* at 37-38.

Additionally, Chapter II of FLEC addresses monopolies and monopolistic practices.⁵⁰ Specifically, Article 8 states “[m]onopolies and state monopolies are prohibited, and also those practices which. . .diminish, impair or prevent competition and free participation in the production, processing, distribution and marketing of goods and services.”⁵¹ Furthermore, Articles 9 through 13 merely expand on what monopolistic practices entail, the conditions necessary to prove monopolistic practices are present, what constitutes as relevant markets, and the factors that need to be addressed when evaluating if an economic agent has significant influence in the relevant market.⁵²

The factors are listed in Article 13 and consist of: (i) analyzing the market share and discerning whether the agent can individually set prices or limit the supply without competitors having the ability to stabilize the market; (ii) evaluating the “entry barriers” and the components that may change the barriers; (iii) examining the competitors’ powers and prominence in the marketplace; (iv) discovering whether access to input is available to the agent and the competitors; and (v) analyzing the agent’s current actions.⁵³ Moreover, FLEC forbids absolute monopolistic practices in Article 10 which includes apportioning segments of the market, fixing prices, inhibiting output, and/or fixing bids.⁵⁴ Absolute monopolistic practices are considered “per se illegal” and the offending agent may be subjected to a fine up to \$7 million for each act.⁵⁵

IV. REGULATORY AGENCIES

A. THE FEDERAL COMPETITION COMMISSION

Besides emphasizing the prohibition of monopolistic practices, FLEC also created the Comisión Federal de Competencia (Federal Competition Commission) (Cofeco).⁵⁶ Congress created Cofeco to act as a regulatory body enforcing the anti-monopolistic provisions stated in FLEC. The creation of Cofeco is attributed to the government’s attempt to combat monopolistic practices.⁵⁷ Furthermore, Article 24 grants Cofeco the capacity to investigate monopolies and monopolistic practices, to implement guidelines to thwart monopolies, to hear cases and inflict administrative sanctions, to remark on public programs instilled by the government which contradict the notions of competition, to review and remark on proposed legislation and regulations, to comment on established laws, although Cofeco’s comments will not be legally binding, to administer the procedures of the Cofeco within, and to aid the Mexican government in

50. Ley Federal de Competencia Económica, *supra* note 46, at 2-5.

51. *Id.* at 3.

52. *Id.* at 3-5.

53. *Id.* at 4.

54. Castañeda, *supra* note 5, at 39.

55. *Id.*

56. *Id.* at 38.

57. Ley Federal de Competencia Económica, *supra* note 46, at 7.

drafting international treaties or agreements.⁵⁸

FLEC also grants Cofeco the ability to discern if an agent has sufficient market dominance and may recommend the government to enact remedies to control such dominance.⁵⁹ Cofeco's powers also allow the regulatory body to decide if an agent is suitable to engage in "spectrum actions" and may "determine the spectrum caps for an individual [agent]."⁶⁰ In addition, Cofeco consists of several individuals that encounter daily proceedings and partake in inquiries supervised by a general secretary that answers to a commissioner.⁶¹ The president elects five commissioners to rule on decisions that can be appealed internally through Cofeco and then ultimately appealed to federal courts.⁶² Presently, Cofeco maintains an annual budget of \$15 million U.S. dollars and consists of over 150 staff members with a majority of staff members having economic rather than legal backgrounds.⁶³

Furthermore, FLEC was recently amended concerning the provisions governing Cofeco in May 2011 to strengthen the regulatory powers of the agency.⁶⁴ The new provisions allow Cofeco to inspect on-site without requiring a court order to search the premises and to impose a maximum one year order to cease activities by setting a specified bond that must be paid in order for the imposition to be lifted.⁶⁵ Hence, the new provisions endowed Cofeco with injunctive capabilities that allow Cofeco to act prior to ruling on a case allowing the agency to be taken more seriously by offending agents.⁶⁶ Additionally, the new amendments allow offending agents to request oral hearings to dispute or supplement their claims while previously, offending agents were only allowed to offer written documents.⁶⁷ Regarding criminal fines, Cofeco may impose fines ranging from 8 to 10 percent of the offending agent's revenue if it is the agent's first offense.⁶⁸ Once the agent commits the offense again, the fine

58. *Id.* at 7-8.

59. OECD, *supra* note 36, at 50.

60. *Id.*

61. Castañeda, *supra* note 5, at 38.

62. *Id.*

63. *Id.*

64. OECD, *supra* note 36, at 50. *See generally*, Decreto por el que se Reforman, Adicionan y Derogan Diversas Disposiciones de la Ley Federal de Competencia Económica, del Código Penal Federal y del Código Fiscal de la Federación [Decree to Reform, Add and Amend Different Interpretations of the Federal Law on Economic Competition, in the Federal Penal Code and the Federal Fiscal Code] Diario Oficial de la Federación [DO], 10 de Mayo de 2011 (Mex.).

65. Alberto de la Peña, *Antitrust Alert: Changes in Mexican Antitrust Law*, HAYNES & BOONE, LLP 1 (May 17, 2011), http://www.haynesboone.com/files/Publication/ab8deab3-1b12-498a-bc5c-d96e195f332c/Presentation/PublicationAttachment/87d04d24-d16d-42b9-be5c-e29b69422bbc/Changes_in_Mexican_Antitrust_Law.pdf.

66. OECD, *supra* note 36, at 50.

67. Iker I. Arriola, et al., *Alerts: Mexican Competition Law—Insight on the May 2011 Reform*, WHITE & CASE, LLP 2 (May 2011), http://www.whitecase.com/files/Publication/ae6650ba-c89a-486b-bad2-e83dac46113e/Presentation/PublicationAttachment/cec12b3a-adf1-4328-a041-01d6cf452957/Alert_Mexican_Competition_Law_Insight_on_the_May_2011_Reform.pdf.

68. de la Peña, *supra* note 65, at 2.

doubles and may reach up to 20 percent of revenue.⁶⁹ Moreover, the offending agent may be subjected to three to ten years in prison if the agent contracted to partake in monopolistic acts.⁷⁰

Although the criminal fines are severe, the new amendments allow the possibility for individuals to acquire immunity through whistleblowing.⁷¹ Individuals that inform authorities of the existence of agreements created to engage in monopolistic behavior will avoid criminal liability as long as the whistleblowing individual submits to a leniency program.⁷² Concerning the involvement of the attorney general, the attorney general will only be involved if Cofeco has efficiently investigated the situation and has established the presence of absolute monopolistic practices that are per se illegal.⁷³ In addition, the amendments now allow Cofeco to initiate class actions on behalf of consumers that have been injured by the offending agent's monopolistic actions.⁷⁴ The amendments allowing class actions stem from a bill amending the Federal Code of Civil Procedure in addition to the FLEC.⁷⁵

B. THE SECRETARIAT OF COMMUNICATIONS AND TRANSPORTATION

The Secretaria de Comunicaciones y Transportes (Secretariat of Communications and Transportation) (SCT) was created as the governmental branch to regulate the telecommunications sector prior to the creation of the Cofeco and Cofetel.⁷⁶ Essentially, the SCT regulated telecommunications in Mexico until 1995 when FLEC created Cofetel, an entity separate from SCT.⁷⁷ Prior to 1995, the SCT was the enforcement agency that regulated the Telmex concession that allowed privatization.⁷⁸ The concession allowed Telmex to maintain a provisional monopoly of "domestic and international long distance telephone service, but in return required Telmex to expand its wire-line network."⁷⁹ Despite its role as regulator, politics forced the SCT to play a smaller part in Telmex's privatization as compared to other governmental bodies, such as Secretaria de Hacienda y Credito Publico. The head of SCT, who also served as President of Telmex's Board of Directors, was against privatizing Mexico's telecommunications industry, and used his power to delay its implementation. As a result, President Salinas removed Lombardo and relegated the SCT to play only a figure head role in Telmex's privatization, serving as "witness

69. *Id.*

70. *Id.*

71. Marco Najera, *Mexico's Major Antitrust Reforms: An Overview of Mexico's Major Antitrust Reforms, Including Increased Sanctions and Fines for Violators*, LATIN BUS. CHRONICLE, Aug. 12, 2011, <http://www.latinbusinesschronicle.com/app/article.aspx?id=5062>.

72. *Id.*

73. *Id.*

74. *Id.*

75. Arriola, et al., *supra* note 67, at 3.

76. OECD, *supra* note 36, at 44.

77. *Id.*

78. Noll, *supra* note 22, at 16.

79. *Id.*

of honor.”⁸⁰

Although the SCT played a limited role in the privatization of Telmex, it currently maintains the power to grant concessions.⁸¹ Concessions are defined as “licenses to operators,” with each license containing the exact manner in which the operator may act with regards to the services provided.⁸² Specifically, the operators submit a specific business statement to the SCT outlining the services with the hopes of obtaining the license, yet the operator must strictly abide by the business statement once the license is granted.⁸³

C. THE FEDERAL TELECOMMUNICATIONS COMMISSION

The Comisión Federal de Telecomunicaciones (Federal Telecommunications Commission) (Cofetel) is currently governed by the Federal Telecommunications Law of 1995 and was founded by a presidential decree in 1996 as a regulatory body.⁸⁴ Unfortunately, Cofetel has been and continues to be a weak regulatory body because Cofetel does not have the capacity to make independent decisions; rather, Cofetel decisions are regulated by the SCT before they are implemented.⁸⁵ Furthermore, the SCT has the power to remove Cofetel commissioners at will even though the commissioners are appointed to set terms.⁸⁶ As a result of SCT regulation, Cofetel remains an inefficient body with the inability to truly regulate Telmex’s monopolistic tendencies. This problem is aggravated because Cofetel struggles to convince Mexican courts of the importance of its decisions.⁸⁷ In addition, Cofetel has made the decision-making procedure overly burdensome and lacking transparency.⁸⁸ Thus, Cofetel’s lack of regulation and autonomy has resulted in “regulatory uncertainties” regarding the telecommunications arena in Mexico.⁸⁹

Various other reasons exist for Cofetel’s inability to regulate including the deficiency of a legislative policy mandate, the lack of enforcement of Cofetel rulings and regulations against offending agents, and the absence of a bureaucratic and conclusive authority to implement regulations that truly affect the offending agents.⁹⁰ Furthermore, although one of Cofetel’s main responsibilities is to apply regulations, there is confusion regarding whether Cofetel may actually draft regulations.⁹¹ The confusion stems from the notion that Cofetel drafts “fundamental plans” on certain issues “such as QoS and interconnection,” yet the drafts lack the formalities to

80. *Id.*

81. OECD, *supra* note 36, at 45.

82. *Id.*

83. *Id.*

84. Noll, *supra* note 22, at 3.

85. *Id.* at 18.

86. *Id.*

87. *Id.* at 20.

88. Manzetti, *supra* note 14, at 790-791.

89. Mariscal, *supra* note 80, at 95.

90. Noll, *supra* note 22, at 9.

91. OECD, *supra* note 36, at 45.

truly be considered a regulation and causes great confusion among the telecommunication industry.⁹² The fundamental plans Cofetel drafts about interconnection are relevant because Cofetel many times serves as the intermediary between companies that fail to reach an interconnection agreement, especially regarding pricing.⁹³

Although Cofetel struggles greatly with enforcement and regulation issues, the agency is structured efficiently and comprised of four commissioners at the highest rank.⁹⁴ Moreover, an essential requirement for the commissioners is the need to have technical expertise, which allows the agency to be technically competent.⁹⁵ The commissioners are individually selected by the President of Mexico for eight year terms subject to re-election.⁹⁶ Unfortunately, politics play a major role in the election of commissioners since past commissioner hopefuls have been blocked by the judiciary through court cases.⁹⁷ Once the commissioners have been selected, the commissioners elect one member to be President of Cofetel and, thus, all branches of Cofetel rely and report to the President while the other commissioners only participate in the discussions and enactment of regulations on the Board of Commissioners.⁹⁸

Cofetel's largest dilemma is due to its legal classification as "*un organismo desconcentrado*"⁹⁹—or a decentralized regulatory agency—and an administrative body of the SCT.¹⁰⁰ As a result of this classification, there have been tensions between Cofetel and the SCT creating uncertainty.¹⁰¹ For example, Cofetel issued a resolution in 2007 to allow a program for bidding on spectrum for mobile telephones and Wi-Max, but the SCT halted these plans arguing that Cofetel did not have the powers to grant licenses nor the authority to allow such a program only to reissue the program under SCT powers.¹⁰² Hence, a possible solution would be to change the classification of Cofetel to a "decentralised body" (*órgano descentralizado*) yet this status normally belongs to publicly owned enterprises as opposed to regulatory agencies.¹⁰³ Additionally, the change in legal status to a decentralised body would allow Cofetel to have its own legal status, control its own budget rather than depending on the SCT for budgetary changes, and refrain from relying on the government to make agency decisions making the agency a more effective tool to regulate the

92. *Id.*

93. Noll, *supra* note 22, at 17.

94. *Id.* at 18.

95. *Id.*

96. OECD, *supra* note 36, at 47.

97. *Id.*

98. *Id.*

99. *Id.* at 45.

100. Judith Mariscal & Federico Kuhlmann, *Effective Regulation in Latin American Countries: The Cases of Chile, Mexico, and Peru*, CENTRO DE INVESTIGACIÓN Y DOCENCIA ECONÓMICAS 10, Nov. 2009, available at <http://libreriacide.com/libros/pdf/DTAP-236.pdf>.

101. *Id.* at 9.

102. *Id.* at 10.

103. OECD, *supra* note 36, at 46.

telecommunication industry.¹⁰⁴

Cofetel's lack of enforcement has affected Mexico's international relations with other countries, specifically the United States, resulting in a WTO Panel reviewing Mexico's lack of conformity with its GATS obligation in the telecommunications sector.¹⁰⁵ In response to the WTO ruling, Cofetel implemented the International Telecommunications Rules on August 11, 2004 in order to replace the ILD Rules, which included provisions concerning the obligation that Telmex negotiate settlement rates for all Mexican carriers, the parallel tariff structure, and the proportional profit arrangement.¹⁰⁶ Many anti-competitive proponents applauded Cofetel's response by enacting the International Telecommunications Rules, yet the same proponents lament that a WTO ruling was necessary in order for Mexico to allow Cofetel to enforce anti-competitive measures against monopolist giants like Telmex.¹⁰⁷

V. DOMESTIC ISSUES CONCERNING TELMEX AND AMÉRICA MÓVIL

A. THE MEXICAN GOVERNMENT AND LEGAL SYSTEM FACILITATING THE MONOPOLY

Mexico's political system, consisting of an executive branch that is subject to strong lobbying powers and political powers of persuasion, has paved the way for Slim to manipulate the system and continue to dominate the telecommunications sector in Mexico.¹⁰⁸ Since the privatization of Telmex, Slim maintained a cozy relationship with President Salinas which facilitated Slim's acquirement of Telmex, and Salinas refused to enforce antitrust laws against Telmex setting a precedent for Telmex.¹⁰⁹ In 1995, during the Zedillo administration, Slim helped keep inflation under control by refusing to increase prices for a year and, consequently, the Mexican government stalled and watered down a bill that was supposed to allow competition to flourish after the designated Telmex monopoly expired.¹¹⁰

President Fox, on the other hand, initially decided to combat the Telmex monopoly and announced plans to create the foundation for permitting foreign competition in Mexico.¹¹¹ Specifically, Fox reorganized Cofetel by appointing new commissioners and aimed to provide the

104. *Id.*

105. Oliver Solano, et al., *Challenges to Effective Implementation of Competition Policy in Regulated Sectors: The Case of Telecommunications in Mexico*, 26 NW. J. INT'L L. & BUS. 527, 543 (2006).

106. *Id.* at 544.

107. *Id.*

108. Manzetti, *supra* note 14, at 791.

109. *Id.* at 788.

110. *Id.* at 789.

111. Luz Estella Ortiz Nagle, *Antitrust in the International Telecommunications Sector: The United States Challenges Mexico's Telmex Monopoly*, 33 U. MIAMI INTER-AM. L. REV. 183, 185-186 (2002).

agency more independence and responsibility.¹¹² Thus, Cofetel seemed revitalized, evidenced by its imposition of a 10 million pesos fine against Telmex under the Telecommunication Act¹¹³ because it found Telmex to be a dominant carrier for local and long-distance markets.¹¹⁴ Telmex responded by requesting an injunction from a Mexican court contending that Cofetel regulations infringed on Telmex's operating license.¹¹⁵ Although Fox made minor accomplishments with regards to combating the Telmex giant, his efforts were finally stalled because of staunch opposition by PRI and PRD legislators.¹¹⁶ Slim won political backing by the PRI and PRD through the Acuerdo Nacional Para la Unidad, El Estado de Derecho, El Desarrollo, La Inversión y El Empleo (Acuerdo de Chapultepec),¹¹⁷ which endorsed infrastructure projects through partnerships between the government and the private sector.¹¹⁸ While the Fox administration made small advancements, the Calderon administration continued in the steps of his predecessors by allowing Telmex to continue monopolistic practices without regulation.¹¹⁹

Apart from convenient political relationships with presidents, the Telmex monopoly is enabled by Mexican courts that allow injunctions to prevent litigation and administrative rulings.¹²⁰ Specifically, Mexico's legal system has a process regarding injunctions which permits regulatory decisions under judicial review to be postponed in the plaintiff's favor.¹²¹ Courts implement the injunction if the plaintiff argues that such a decision will cause the plaintiff financial harm.¹²² Due to backlogging of the court system, the injunction usually lasts several years and by the time the injunction is finally heard in court, the regulation no longer applies because of changes in the telecommunications industry.¹²³ As a result of the abuse that occurs concerning the injunctive system in Mexico, Telmex gains financially while new competitors suffer economically.¹²⁴ Likewise, Cofetel regulations continue to be subjected to injunctions because courts require a justification for their decision, and Cofetel usually cannot justify regulations due to the secretive nature of regulatory drafting procedures.¹²⁵ Most regulations promulgated by Cofetel have been subjected

112. *Id.* at 208.

113. Ley Federal de Telecomunicaciones, *supra* note 8.

114. Nagle, *supra* note 112, at 208.

115. *Id.*

116. Manzetti, *supra* note 14, at 790.

117. *Acuerdo Nacional Para la Unidad, El Estado de Derecho, El Desarrollo, La Inversión y El Empleo* 9 ESPACIOS PÚBLICOS 486 (2006) available at <http://www.redalyc.org/pdf/676/67601734.pdf>.

118. Manzetti, *supra* note 14, at 790.

119. *Id.* at 789 (It should be interesting to observe how the Peña Nieto Administration will interact with the Slim and whether he will continue to allow the monopolization of the telecommunications sector like his predecessors).

120. *Id.* at 791.

121. OECD, *supra* note 36, at 12.

122. Noll, *supra* note 22, at 20.

123. *Id.*

124. OECD, *supra* note 36, at 12.

125. Noll, *supra* note 22, at 21.

to an injunction by Telmex or its competitors resulting in confusion about what requirements carriers should abide by with regards to pricing and services.¹²⁶ Hence, the only way to end this “catch twenty-two” dilemma is by allowing Cofetel regulations to remain in place until a court can decide the issue.¹²⁷

B. THE LACK OF FOREIGN INVESTMENT IN THE TELECOMMUNICATIONS SECTOR

Another reason the Slim monopoly has continued to flourish is due to the lack of foreign investment in the telecommunications sector in Mexico, and few investors are willing to invest capital in Mexican telecommunications considering the history.¹²⁸ Investor confidence was slightly restored by the policy changes of the 1990s, but implementing these new policies was not sufficient to maintain foreign investment in the telecommunications industry.¹²⁹ The first wave of foreign investment occurred when SBC International and France Telecom joined Slim to bid for Telmex in 1990 by purchasing 10 percent and 5 percent of the Mexican telecom company.¹³⁰ Southwestern Bell also became one of the foreign minority partners to invest in the privatization of Telmex.¹³¹ Sprint also decided to partner with Telmex in 1995, concentrating on international services with consumers, carriers, and corporations.¹³² The Sprint/Telmex venture was specifically geared at Hispanic consumers living in the United States.¹³³ Unfortunately, the joint venture abruptly ended in 1999 when Telmex wanted to expand into the area of money orders while Sprint refused, which resulted in Telmex buying Sprint's shares in Telmex.¹³⁴ Furthermore, there was speculation raised concerning Telmex's real motive for dissolving the joint venture such as Telmex wanting to work with other U.S. companies in the long-distance services sector.¹³⁵

Conversely, several foreign investors also attempted to partner with Mexican companies to compete with Telmex with a prime example being the joint venture between MCI Communications Corporation and Banacci, also known as Avantel, S.A.¹³⁶ Avantel's business model consisted of providing a fiber optic cable network linking Mexico City, Mon-

126. *Id.*

127. OECD, *supra* note 36, at 12.

128. *Id.* at 99.

129. Marcus Eyth, *The Telmex Saga Continues: Foreign Investors' Expectations and Realizations In the Struggle to Compete in the Mexican Telecommunications Market*, 14 PACE INT'L L. REV. 211, 213 (2002).

130. *Id.* at 235.

131. OECD, *supra* note 36, at 22.

132. Eyth, *supra* note 130, at 235.

133. *Id.*

134. *Id.* at 235-236.

135. *Sprint, Telmex to End Long-Distance Venture*, L.A. TIMES, May 5, 1999, <http://articles.latimes.com/1999/may/05/business/fi-34038>.

136. Eyth, *supra* note 130, at 236.

terrey, and Guadalajara in addition to providing long-distance services.¹³⁷ Avantel was eventually acquired by Axtel in 2006 resulting in connectivity in 200 cities including some of the most important cities in Mexico.¹³⁸ Another prominent foreign investment joint venture consisted of Alestra, which was created by AT&T and Alfa Telecom; Alestra later joined with Unicom.¹³⁹ This joint venture provided several communication services to Mexican consumers with a proposed investment of over \$1 billion to efficiently compete with Telmex.¹⁴⁰ AT&T ultimately left the joint venture in 2010.¹⁴¹

Another prominent joint venture that is still currently competing with Telmex is Iusacell, created by Bell Atlantic and Grupo Iusacell, S.A.¹⁴² The partnership between Bell Atlantic and Grupo Iusacell initially geared its telecommunications services at local and long-distance but later decided to embark on the wireless market and was allowed a five year plan by the government in order to spread services into rural areas.¹⁴³ Furthermore, the government had previously approved a fifty year franchise for Iusacell in basic telephone services since 1957.¹⁴⁴ In addition, Iusacell was the first company to offer cellular phones in Mexico.¹⁴⁵ Thus, when Telcel appeared in the mobile telephone scene, it quickly overtook the mobile telephone market which had previously been held by Iusacell.¹⁴⁶ In March 2007, there was a massive merger between Iusacell and Unefon Holdings.¹⁴⁷ Unefon belongs to Grupo Salinas, held by Ricardo Salinas Pliego, an affluent entrepreneur in Mexico who also owns TV Azteca.¹⁴⁸ Ironically, TV Azteca's broadcasting nemesis, Televisa, announced plans to buy 50 percent of Iusacell in April 2011.¹⁴⁹

C. PROMINENT THREATS TO SLIM'S MONOPOLY: IUSACELL AND COFECO

The competition between Telmex and Iusacell really came to a head when Telcel, Slim's mobile telephone company, infiltrated the mobile telephone market through initial advantages that allowed Telcel to become the leading operator with the largest network and around a 70 percent share of the market.¹⁵⁰ Although Iusacell has been attempting to compete with Telcel, Slim's monopoly truly became threatened when the television giant, Televisa, offered to buy 50 percent of Iusacell's shares in

137. *Id.*

138. OECD, *supra* note 36, at 22.

139. Eyth, *supra* note 130, at 236.

140. *Id.*

141. OECD, *supra* note 36, at 22.

142. Eyth, *supra* note 130, at 236.

143. *Id.* at 237.

144. OECD, *supra* note 36, at 23.

145. Rentería, *supra* note 31, at 62.

146. Prieto, *supra* note 26, at 16.

147. OECD, *supra* note 36, at 23.

148. Rentería, *supra* note 31, at 62.

149. OECD, *supra* note 36, at 23.

150. Prieto, *supra* note 26, at 16.

2011.¹⁵¹ The new deal has united two previous rivals, Emilio Azcarraga and Ricardo Pliego Salinas, in a quest to challenge Telcel's monopoly on mobile telephones and Telmex's monopoly of fixed-line telephones.¹⁵² As a result of the huge merger, Cofeco instilled various regulations on the pending \$1.6 billion deal.¹⁵³ Yet prior to instilling such regulations, Cofeco actually prohibited the merger in January of 2012 due to concerns about price collusion regarding free-to-air and pay television markets.¹⁵⁴ Particularly, Cofeco focused on the fact that Televisa and TV Azteca are the two leading television broadcasting companies and such a union in the mobile telephone industry could eventually led to negative monopolistic practices in the television broadcasting industry.¹⁵⁵ As a result, Cofeco decided to appeal its previous decision by deciding that the benefits for consumers in the mobile telephone industry outweighed the possible television market collusion.¹⁵⁶

Consequently, Cofeco published specific regulations threatening the two companies that if they did not abide by the regulations, the consequences would be a 10 percent fine of their yearly revenue.¹⁵⁷ One of the conditions for allowing the existence of the merger depends on a bid conducted by the government in order to allow the creation of another television network to deter the Televisa and TV Azteca monopoly of broadcasting networks in Mexico.¹⁵⁸ Furthermore, the condition specifically decrees that if, after twenty four months have passed and a third television network has not been successfully created, then the merger between Televisa and Iusacell will automatically terminate.¹⁵⁹ But this problem does not seem likely because Cofetel recently approved a deal comprised of two new digital television channels that would reach around 93 percent of the Mexican population.¹⁶⁰ Another condition imposed by Cofeco is that television advertisers cannot be forced to become Iusacell customers.¹⁶¹ Moreover, Televisa must allow advertising time on its network to other competitors in the telecommunications industry, including

151. OECD, *supra* note 36, at 23.

152. Ivan Castano, *Threat To Carlos Slim's America Movil Heats Up As Televisa Acquisition Of Iusacell Stake Okayed*, FORBES (June 20, 2012, 5:31 PM), <http://www.forbes.com/sites/ivancastano/2012/06/20/threat-to-carlos-slims-america-movil-heats-up-as-televisa-acquisition-of-iusacell-stake-okayed/>.

153. Cynthia Barrera, *Update 1-Televisa, Iusacell Accept Tie-up Conditions*, REUTERS (June 19, 2012, 2:27 PM), <http://www.reuters.com/article/2012/06/19/iusacell-televisa-idUSL1E8HJAP420120619> [hereinafter *Update 1*].

154. Anthony Harrup, *Commission Rules on Televisa-Iusacell Appeal*, MARKET WATCH (June 7, 2012, 11:30 AM), <http://www.marketwatch.com/story/commission-rules-on-televisa-iusacell-appeal-2012-06-07>.

155. *Id.*

156. *Id.*

157. Cynthia Barrera, *Update 3-Mexico Slaps Conditions on Televisa-Iusacell Tie-up*, REUTERS (June 14, 2012, 6:04 PM), <http://www.reuters.com/article/2012/06/14/iusacell-televisa-idUSL1E8HE33920120614> [hereinafter *Update 3*].

158. *Id.*

159. *Id.*

160. Harrup, *supra* note 155.

161. Barrera, *Update 1*, *supra* note 154.

Slim's companies.¹⁶² Lastly, the merger must offer customers a new pay television package with access to public channels owned by Televisa.¹⁶³ With all the conditions in mind, Televisa and Iusacell consented in writing to the terms of the conditions imposed by Cofeco on June 2012.¹⁶⁴ Hence, it will be interesting to observe whether Iusacell becomes a dominant multi-play participant again in the mobile telecommunications industry.¹⁶⁵

But the competition between Telcel and Iusacell also came to a head prior to the merger, when Iusacell initiated a complaint against Telcel to Cofetel, because Telcel had breached the rules of portability.¹⁶⁶ Specifically, the complaint stated that Telcel had refused or delayed the PIN retrieval for electronic devices concerning users that wanted to switch telephone companies.¹⁶⁷ Such harmful behavior by Telcel against Iusacell was in direct violation of the Federal Telecommunications Law of 1995.¹⁶⁸ Iusacell asked Cofetel to use its regulatory powers to discover whether the violations were actually committed and to propose sanctions to the SCT.¹⁶⁹ As a result, Cofeco became involved and imposed a \$1 billion fine on Telcel because Telcel was also overcharging competitors for connecting telephone calls to Telcel users.¹⁷⁰ Specifically, Telcel was charging competitors a higher interconnection fee for other users that attempted to connect with Telcel users while allowing lower prices for calls between Telcel customers.¹⁷¹ The fine derived from FLEC's amendments¹⁷² allowing for the maximum penalty, 10 percent of assets belonging to the company, because Telcel was considered a recurring offender.¹⁷³ Furthermore, Cofeco allowed Telcel thirty days to file an appeal, which Telcel quickly did.¹⁷⁴ Besides filing an appeal, the Supreme Court ruled that Slim could not partake in a legal move which it had

162. Barrera, *Update 3*, *supra* note 157.

163. *Id.*

164. *Id.*

165. OECD, *supra* note 36, at 117.

166. *Iusacell Launches a New Lawsuit against Telcel*, CNNEXPANSION (Apr. 4, 2011, 7:24 PM), <http://www.cnnexpansion.com/negocios/2011/04/04/telcel-bloquea-el-cambio-de-compania>.

167. *Id.*

168. *Id.*; see generally, Ley Federal de Telecomunicaciones, *supra* note 8.

169. *Iusacell Launches a New Lawsuit against Telcel*, *supra* note 167.

170. *Carlos Slim's Company to Pay \$1 Billion Fine for Monopolistic Practices*, FOX NEWS LATINO (Apr. 25, 2011), <http://latino.foxnews.com/latino/news/2011/04/25/carlos-slims-company-pay-billion-dollar-fine-monopolistic-practices/>.

171. *Id.*

172. Decreto por el que se Reforman, Adicionan y Derogan Diversas Disposiciones de la Ley Federal de Competencia Económica, del Código Penal Federal y del Código Fiscal de la Federación [Decree to Reform, Add and Amend Different Interpretations of the Federal Law on Economic Competition, in the Federal Penal Code and the Federal Fiscal Code] Diario Oficial de la Federación [DO], 10 de Mayo de 2011 (Mex.).

173. *Carlos Slim's Company to Pay \$1 Billion Fine for Monopolistic Practices*, *supra* note 171.

174. *Id.*

previously used to combat against lowering tariffs.¹⁷⁵ The combination of the above actions demonstrated that the Mexican government and regulatory agencies were finally ready take steps to create a more competitive atmosphere in the telecommunications industry and to put an end to Slim's monopoly.¹⁷⁶ Unfortunately, the positive steps towards allowing competition were halted when Cofeco decided to overturn the \$1 billion fine in May of 2012 in return for Telcel adhering to five pledges.¹⁷⁷ Some of the pledges included Telcel promising to lower interconnection fees, as well as promising to offer plans that allow customers to be charged equally for calls made within the Telcel network as calls made to customers of other competing networks.¹⁷⁸ Specifically, Cofeco asked Telcel to drop the interconnection fee by 20 percent.¹⁷⁹ Another concession was that Telcel agreed to drop any current lawsuit it has instituted against interconnection rulings.¹⁸⁰ Moreover, the rationale behind overturning the fine was due to Cofeco deciding that it was better to allow consumers to see an immediate benefit through the pledges by Telcel than to continue the legal battle with Telcel would ultimately end in a small fine compared to the \$6 billion that could benefit consumers through the pledges.¹⁸¹ But some individuals argue that the \$6 billion in concessions that Telcel is going to give up is repayment for the \$6 billion already spent by consumers due to Telcel's unreasonably high interconnection fee.¹⁸² Overall, if Telcel does not adhere to the pledges in order to lift the \$1 billion fine then Cofeco will continue to fine Telcel by up to 8 percent of its yearly revenue.¹⁸³

While Slim was able to avoid a hefty fine for his mobile phone company, Telcel, he has not been so lucky with his wire line company, Telmex, which was recently fined \$52 million for engaging in anti-competitive practices.¹⁸⁴ Cofeco fined Telmex after it discovered that Telmex had de-

175. Elisabeth Makin, *Mexico Takes Aim at a Titan in Telecom*, N.Y. TIMES, May 9, 2011, at B1, available at http://www.nytimes.com/2011/05/09/business/global/09telecoms.html?pagewanted=all&_r=0.

176. *Id.*

177. Kerry A. Dolan, *Carlos Slim's America Movil Gets Reprieve On \$1 Billion Fine, Sees Net Worth Climb*, FORBES (May 3, 2012 2:35 PM), <http://www.forbes.com/sites/kerryadolan/2012/05/03/carlos-slims-america-movil-gets-reprieve-on-1-billion-fine-sees-net-worth-climb/>.

178. *Id.*

179. Will Grant, *Carlos Slim's America Movil Escapes Record Mexican Fine*, BBC NEWS (May 3, 2012), <http://www.bbc.co.uk/news/world-latin-america-17945577>.

180. *Cofeco Withdraws Telcel Fine in Return for Competition Commitments*, TELEGEOGRAPHY, (May 4, 2012), <http://www.telegeography.com/products/commsupdate/articles/2012/05/04/cofeco-withdraws-telcel-fine-in-return-for-competition-commitments/>.

181. Grant, *supra* note 180.

182. Ronald Buchanan, *America Movil Unit Avoids \$1bn Fine*, FT.COM (May 3, 2012), <http://www.ft.com/intl/cms/s/0/377c5248-953e-11e1-ad38-00144feab49a.html#axzz2KWYNOE23>.

183. TELEGEOGRAPHY, *supra* note 181.

184. *Update 2-Mexico's Competition Agency Fines Slim Company \$52 mln*, REUTERS (Feb. 7, 2013, 3:23 PM), <http://www.reuters.com/article/2013/02/07/mexico-telmex-idUSL1N0B784220130207>.

nied Axtel, a competitor in the telecommunications industry, admittance to parts of its network.¹⁸⁵ Specifically, Telmex declined to permit Axtel to use Telmex's network in several locations in Mexico for over two years, causing Axtel to fall deep into debt and even resort to a debt exchange offer in order to maintain the company in existence.¹⁸⁶

VI. EFFECTS ON INTERNATIONAL RELATIONS

A. INTERNATIONAL FEATURES OF THE TELECOMMUNICATIONS SECTOR IN MEXICO

Mexico's laws concerning international ownership in the telecommunications sector has greatly affected its relationships with international actors, including the United States.¹⁸⁷ Specifically, Mexico limits the foreign ownership of fixed line telecommunications by 49 percent while cellular operators are permitted up to 100 percent as long as the ownership is approved by the National Foreign Investment Committee.¹⁸⁸ As a result of the constraint on international investors, new competitors cannot enter the telecommunications sector successfully and these constraints impede competition by allowing existing operators, such as Telmex, to continue monopolizing the industry.¹⁸⁹ Furthermore, such actions strain international relations between the United States and Mexico because América Móvil, on the other hand, has entered the United States and other Latin American countries' markets and successfully engaged in competition without the harsh barriers that international actors experience in Mexico.¹⁹⁰

The situation finally came to a head when Cofetel gave Telmex the ability to fix the rate that was to be paid by foreign carriers terminating calls in Mexico and, thus, required all other Mexican companies to abide by this minimum rate.¹⁹¹ The Mexican companies gathered to participate in a market-sharing system by price-fixing the minimum rate charging international carriers, which resulted in infuriating American companies that such incumbent-protective strategies were being endorsed by the Mexican government.¹⁹² In addition, according to the United States, Mexico was violating its GATS obligations by endorsing such anti-competitive behavior.¹⁹³ Mexico was one of sixty-nine member states that signed the GATS Annex on Telecommunications¹⁹⁴ and submitted a

185. *Id.*

186. *Id.*

187. OECD, *supra* note 36, at 104.

188. *Id.*

189. *Id.*

190. *Id.*

191. Eleanor M. Fox, *The WTO's First Antitrust Case—Mexican Telecom: A Sleeping Victory for Trade and Competition*, 9 J. INT'L ECONOMIC L. 271, 276 (2006).

192. *Id.*

193. *Id.*

194. General Agreement on Trade in Services, Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 1 B, 1867 U.N.T.S. 283, 313 [hereinafter Annex on Telecommunications].

Schedule of Specific Commitments outlining commitments related to telecommunication services in Mexico.¹⁹⁵

B. THE REFERENCE PAPER IN THE 1997 AGREEMENT
ON BASIC TELECOMMUNICATIONS

A large part of the conflict centered around the Reference Paper included in the 1997 Agreement on Basic Telecommunications that incorporated pledges from member countries to maintain a competitive industry with regards to telecommunications.¹⁹⁶ In addition, Mexico had committed to abide by "Articles XVI (Market Access), XVII (National Treatment), and Article XVIII (Additional Commitments)."¹⁹⁷ The Reference Paper includes six sections that establish commitments by members regarding competitive friendly market access in the telecommunication industry for service providers.¹⁹⁸ Specifically, section 1.1 of the Reference Paper states that "[a]ppropriate measures shall be maintained for the purpose of preventing suppliers, who, alone or together, are a major supplier from engaging in or continuing anti-competitive practices."¹⁹⁹ Furthermore, section 1.2 of the Reference Paper addresses the safeguards as well as what anti-competitive practices apply, including cross-subsidization, utilizing market information acquired by competitors for anti-competitive purposes, and not informing or allowing other service providers access to practical data about crucial services or critical market information, with the intent of preventing the service providers from effectively offering services.²⁰⁰

Furthermore, section 2 describes the commitments for interconnection by major suppliers stating that the services need to be "under non-discriminatory terms, conditions, and rates, and of no less quality no less favorable than that provided for its own like services or for like services of non-affiliated service suppliers."²⁰¹ In addition, the Reference Paper allows for members to delineate the type of obligations they are willing to maintain, which are considered acceptable as long as the obligations are transparent, competitively unbiased and are not per se anti-competitive.²⁰² Thus, in light of these sections in the Reference Paper, the United States, on behalf of AT&T and MCI, claimed that Mexico had participated in anti-competitive behavior.²⁰³ Mexico vehemently denied the allegations arguing that the Reference Paper does not force a nation to monitor cartels or take actions against cartels and argued further that cartel conduct is not considered an anti-competitive practice because the

195. Fox, *supra* note 192, at 277; *see generally* General Agreement on Trade in Services, Mexico: Schedule of Specific Commitments (Apr. 15, 1994), GATT B.I.S.D. (1994).

196. Fox, *supra* note 192, at 277.

197. Panel Report, *supra* note 10, at 1.

198. Ortiz, *supra* note 112, at 219.

199. Fox, *supra* note 191, at 277.

200. *Id.* at 278.

201. Nagle, *supra* note 112, at 219.

202. *Id.* at 220.

203. Fox, *supra* note 192, at 278.

word "cartel" is not included in the text or examples of the Reference Paper.²⁰⁴

The United States finally reached out to Mexico on August 17, 2000, by requesting a meeting governed by Article 4 of the Understanding on Rules and Procedures Governing the Settlement of Disputes²⁰⁵ as well as Article XXIII of the General Agreement on Trade and Services²⁰⁶ to address Mexico's failure to enforce its GATS commitment.²⁰⁷ The parties finally met but could not reach a mutual agreement on the matter;²⁰⁸ the United States invoked the Dispute Settlement Body (DSB) of the WTO to create a panel to address the anti-competitive measures endorsed by Mexico regarding telecommunications services.²⁰⁹ On August 26, 2002, the Director-General composed a panel of a chairman and two members, as well as third party participation of various countries such as Australia, Cuba, Guatemala, and Honduras, resulting in a final report being issued on March 12, 2004.²¹⁰

C. WORLD TRADE ORGANIZATION PANEL

The WTO is recognized as the ideal forum for solving transnational trade disagreements among member states.²¹¹ The authority to solve disputes is derived from Article 23 of the 1994 GATT,²¹² sections from specific agreements, and Understanding on Rules and Procedures Governing the Settlement of Disputes [hereinafter DSU].²¹³ Moreover, the General Counsel of the WTO serves as the DSB by monitoring and facilitating the several phases of disputing parties.²¹⁴ The first stage of the dispute includes a consultation between the parties, with the complaining party having the ability to request a dispute resolution panel if the consultation is not successful after sixty days.²¹⁵ In addition, only governments have standing in the WTO, thus private enterprises must ask governments to bring cases before the WTO, requesting consultations and then panels if the dispute is not resolved.²¹⁶

204. *Id.* at 278- 279.

205. Understanding on Rules and Procedures Governing the Settlement of Disputes art. 4, Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 2, 1869 U.N.T.S. 401 [hereinafter DSU].

206. General Agreement on Trade in Services art. XXIII, Apr. 15, 1994, 1867 U.N.T.S. 283, 301.

207. Panel Report, *supra* note 10, at 1.

208. Solano, et al., *supra* note 106, at 543.

209. Panel Report, *supra* note 10, at 1.

210. *Id.* at 2.

211. Nagle, *supra* note 112, at 214.

212. General Agreement on Tariffs and Trade, Article XXIII, Oct. 30, 1947, 61 Stat. A-11, 55 U.N.T.S. 194 [hereinafter GATT].

213. Nagle, *supra* note 112, at 214; *see generally* Understanding on Rules and Procedures Governing the Settlement of Disputes, *supra* note 206.

214. Nagle, *supra* note 112, at 214.

215. *Id.*

216. Bernard M. Hoekman & Petros C. Mavroidis, *WTO Dispute Settlement, Transparency and Surveillance*, 23 THE WORLD ECON. 527, 529 (2000).

The WTO panel hears oral and written arguments from the debating parties as well as from third member countries and, ultimately, presents the parties with a draft report allowing the parties to submit comments.²¹⁷ An interim report is then issued and becomes the final report if no comments are submitted, and the final report is implemented at the DSB if the parties do not signal a desire to appeal the results.²¹⁸ If the disputing party is found to have violated any WTO agreement, the panel issues the government suggestions on how to comply with WTO guidelines and is allowed discretion on how to apply the measures.²¹⁹ Hence, the panel may only suggest how the losing party may comply with WTO guidelines, rather than actually implementing enforcement mechanisms.²²⁰ Furthermore, the panel may not award damages or compensation even if the party is found guilty of violating WTO agreements, which, due to the lack of enforcement and compensation once a ruling is issued, results in many countries deciding not to bring disputes before the WTO.²²¹

In accordance with WTO procedure, the United States, specifically the United States Trade Representative (USTR), declared on October 10, 2000, that the United States was requesting a WTO panel to decide whether Mexico had participated in anti-competitive actions and failed its WTO commitments.²²² The USTR brought the complaint on behalf of AT&T, which owns a large stake in Alestra, and MCI, which holds 45 percent of the stock in Avantel.²²³ Both Alestra and Avantel are Telmex's two large contenders with regards to long distance service providers in the telecommunications industry.²²⁴ Alestra and Avantel are two of twenty-seven carriers that are allowed to serve as long-distance carriers and are affiliated with prominent American companies.²²⁵

Prior to the complaint brought by the USTR, Alestra and Avantel had filed a complaint in 1998 with the CFC against Telmex because Telmex was obstructing Avantel from using toll free numbers for commercial customers since Telmex was deducting a certain amount per call from phone cards that were aimed at dialing toll free numbers.²²⁶ In 1998, the U.S. Federal Communications Commission (FCC) also became involved in the battle against Telmex because of Telmex's refusal to establish equitable settlement rates for service providers in the long-distance telecommunications industry.²²⁷ Hence, the FCC also became involved in this instance in addition to the USTR by warning that if Mexico did not allow the telecommunications industry to permit foreign competitors to ade-

217. Nagle, *supra* note 112, at 214- 215.

218. *Id.* at 215.

219. Hoekman & Mavroidis, *supra* note 217, at 530.

220. *Id.*

221. *Id.* at 531.

222. Nagle, *supra* note 112, at 232.

223. *Id.* at 233.

224. *Id.* at 232.

225. Panel Report, *supra* note 10, at 2.

226. Nagle, *supra* note 112, at 233.

227. *Id.* at 235.

quately compete in the Mexican market, it would delay Mexican telecommunications business ventures in the United States.²²⁸

As a result of the USTR and the FCC encouraging the United States to bring a complaint before the WTO panel, the United States had several requests and recommendations for the panel on how it should rule.²²⁹ Specifically, the United States requested that the panel conclude that Mexico had not abided by its GATS Schedule of Commitments due to Mexico's failure to provide interconnection to service providers on a transnational basis with sensible rates and conditions in accordance with sections 2.1 and 2.2 of the Reference Paper.²³⁰ The United States' main concern was that Telmex overcharges U.S. service providers for calls originating from the United States costing U.S. service providers billions of dollars because Mexico and the United States have the highest international connection.²³¹

Furthermore, the United States argued that Mexico violated section 1.1 of the Reference Paper by failing to stop Telmex from participating in anti-competitive behavior and allowing Telmex to continue partaking in cartel-like behavior under Mexico's International Long Distance Rules (ILD Rules).²³² The ILD Rules were instituted by Cofetel to allow new entrants in the market to acquire a fair price and prevent international service providers from forcing Mexican companies to accept certain prices.²³³ Likewise, the ILD Rules regulate long-distance services as well as the terms that may be included in interconnection agreements with international service providers.²³⁴ For example, Rule 10 of the ILD Rules states that the service provider with the highest number of outgoing calls, in this case Telmex, has to set the settlement rate for other Mexican service providers in addition to only assenting to a balanced share of incoming calls.²³⁵ Due to the high settlement rate established by Telmex, most Mexicans have difficulty affording such telecommunications services, and the situation is only exacerbated in rural areas where Telmex charges an even higher rate because the Telmex network is less prominent.²³⁶

Likewise, Rules 2 and 16 address how carriers cannot allow more incoming than outgoing calls until they pay Telmex for the ability to accept more calls than their designated amount.²³⁷ Additionally, Rule 13 gives Telmex the power to designate the termination rate because it had the

228. *Id.*

229. Panel Report, *supra* note 10, at 6.

230. *Id.*

231. Nagle, *supra* note 112, at 227-228.

232. Panel Report, *supra* note 10, at 6.

233. Luis Armando López Linaldi, *The Mexico-Telecoms Case: What Lessons Can be Drawn for South Asian Countries?*, CUTS INT'L, Sept. 2009, at 5.

234. Panel Report, *supra* note 10, at 4.

235. Fox, *supra* note 192, at 278.

236. Nagle, *supra* note 112, at 228.

237. Fox, *supra* note 192, at 278.

largest number of outgoing long-distance telephone calls.²³⁸ Hence, Rule 13 is viewed among Mexican service providers as a Telmex price-fixing mechanism and Rules 10 and 16 are considered to endorse cartel-like behavior.²³⁹ The problem with allowing Telmex to set the rates is that the Mexican government is disregarding international agreements that normally set international calling fees.²⁴⁰ The United States further argued that Mexico refused to give the United States access to public telecommunication networks and services through interconnection for scheduled services and through privately rented circuits for scheduled services.²⁴¹ The largest problem is that Telmex clearly fits the monopolist category since it went from capturing 70 percent of the long distance telephone market to 81 percent in a few short years while still dominating 95 percent of the local market.²⁴² Thus, Telmex, as a monopolist, is clearly preventing international companies, specifically American associated companies, from adequately competing in the Mexican telecommunications market.²⁴³

Mexico, on the other hand, asked the WTO Panel to hold that Mexico has not violated its GATS obligations under sections 1.1, 2.1, and 2.2 of the Reference Paper included in Mexico's GATS Schedule of Specific Commitments,²⁴⁴ and section 5 of the GATS Annex on Telecommunications.²⁴⁵ Mexico's first argument regarding section 1 was that Mexican firms, particularly Telmex, did not engage in anti-competitive behavior in violation of antitrust laws because the Mexican government had ordered the firms to partake in such behavior, giving Mexican firms a state action defense to the United States' claims.²⁴⁶ Moreover, Mexico argued that it was authorized to implement rules allowing cartels under the notion of regulatory sovereignty for the purpose of advancing Mexican infrastructure.²⁴⁷ In particular, Mexico argued that Rules 10 and 13 of the ILD protect domestic infrastructure by inhibiting the incumbent carrier from allocating a better deal for itself than new entrants in the market, thwarting large carriers from collaborating to disregard smaller carriers, and preventing a price war that could lead all carriers to lower their prices to the point of negatively affecting Mexican infrastructure.²⁴⁸

The WTO responded by finding that the ILD Rules violated Mexico's guarantee to prevent anti-competitive practices under section 1.1 of the

238. *Id.*

239. *Id.*

240. Nagle, *supra* note 112, at 228.

241. Panel Report, *supra* note 10, at 7.

242. Nagle, *supra* note 112, at 228.

243. *Id.*

244. See generally General Agreement on Trade in Services, *Mexico: Schedule of Specific Commitments*, Apr. 15, 1994, GATT B.I.S.D. (1994).

245. Panel Report, *supra* note 10, at 7; see generally General Agreement on Trade in Services, Annex on Telecommunications, *supra* note 195.

246. Fox, *supra* note 192, at 279.

247. *Id.*

248. *Id.*

Reference Paper.²⁴⁹ The WTO began the analysis by focusing on three essential components of section 1.1, which included analyzing the meanings of "major supplier," "anti-competitive practices," and "appropriate measures."²⁵⁰ First, the WTO found that Telmex was a major supplier because of Telmex's capacity to establish the conditions of participation in the relevant market, which the WTO Panel found to be the termination of telephone services in Mexico.²⁵¹ Second, the WTO Panel held that anti-competitive practices included action by a major supplier without agreement with other suppliers and is mainly based on the supplier's ability to affect prices or supply through the use of a dominant position.²⁵² The largest concern behind anti-competitive practices was the occurrence of single firms in the telecom supply industry, which were recently transformed from state-owned to private entities, demonstrating dominant power in the market by keeping international competitors out of the market.²⁵³ Telmex's plan consisted of anti-competitive practices that greatly increased American carrier's costs on the termination of calls in Mexico.²⁵⁴

Furthermore, the Panel analyzed the ILD Rules and evaluated whether such rules endorsed anti-competitive practices resulting in a lack of appropriate measures under Section 1 of the Reference Paper.²⁵⁵ Consequently, the Panel concluded that the uniform settlement rate and the proportionate return systems dictated by the ILD Rules by a major supplier, such as Telmex, were anti-competitive according to section 1.²⁵⁶ Lastly, the WTO Panel addressed what were considered appropriate measures and held that they consisted of measures to prevent a major supplier from participating in anticompetitive behavior.²⁵⁷ Here, Mexico's commitment to adhere to its GATS obligations trumps Mexico's adherence to the ILD Rules and prohibits Mexico from ordering Telmex from engaging in repressive termination fees because the Mexican government cannot do so directly.²⁵⁸

Concerning section 2.1 of the Reference Paper, the Panel concluded that interconnection was not limited to domestic services; rather, the elements of interconnection applied to international services as well.²⁵⁹ Moreover, the Panel found that in this situation, because the suppliers connect their networks with Mexican suppliers at the border to allow calls to terminate in Mexico, those services are considered cross-border as in-

249. *Id.*

250. Panel Report, *supra* note 10, at 190.

251. *Id.* at 191.

252. *Id.* at 192.

253. Fox, *supra* note 192, at 282.

254. *Id.* at 283.

255. Panel Report, *supra* note 10, at 190.

256. *Id.* at 198.

257. *Id.* at 199.

258. Fox, *supra* note 192, at 287.

259. Angus Henderson, et al., *WTO Principles and Telecommunications in Developing Nations: Challenges and Consequences of Accession*, 29 TELECOMM. POLICY 205, 218 (2005).

corporated in GATS.²⁶⁰ The Panel also decided that section 2.2 of the Reference Paper was not meant to exclude international interconnection by contemplating the effect of section 2.2, which states that interconnection needs to be available “at any technically feasible point in the network.”²⁶¹ Additionally, section 2.2 focuses on the cost-oriented interconnection and states that the rates need to be reasonable and transparent and, hence, the United States argued that settlement rates U.S. associated companies were required to pay were two and a half times the amount those that domestic companies paid.²⁶²

The Panel established that only costs gained while directly providing interconnection were the costs to be analyzed, yet the accounting rate established by each country is subject to the interconnection costs included in the Reference Paper and cannot exempt countries from their commitment to the Reference Paper.²⁶³ The Panel also took into account that, in order to reasonably assess economic feasibility, the rate needs to be adjustable to demonstrate the overall rationale that rates need to be causally linked to services costs.²⁶⁴ The decision was strongly based on evidence presented by the United States establishing that the rates set by Mexico were not cost oriented, and Mexico did not refute the evidence causing the Panel to rely on the U.S. findings.²⁶⁵

The last important part of the decision revolved around section 5 of the GATS Annex on Telecommunications and whether Mexico had fulfilled its obligations.²⁶⁶ One of the United States’ main arguments was that U.S. suppliers were not guaranteed access to public telecommunications networks and services in Mexico in violation of section 5.²⁶⁷ Mexico refuted by arguing that the Annex is not applicable to the access to public telecommunications networks and services regarding basic telecommunications services, and that no commitment was made concerning cross-border supply.²⁶⁸ Therefore, the Panel concluded that if a WTO member includes basic telecommunication services in its schedule of commitments, then the Annex will apply, including section 5.²⁶⁹ In addition, the Panel found Mexico’s rates to be unreasonable in addition to the notion that Mexico failed to allow U.S. service providers access to private leased circuits to connect to public telecommunications networks in violation of section 5.²⁷⁰

Overall, the Panel held that Mexico had violated section 2.2(b) and section 1.1 of the Reference Paper, section 5(a) of the GATS Annex on

260. Panel Report, *supra* note 10, at 149.

261. Henderson, et al., *supra* note 260, at 218.

262. López Linaldi, *supra* note 234, at 4.

263. *Id.*

264. Henderson, *supra* note 260, at 219.

265. *Id.*

266. Panel Report, *supra* note 10, at 199.

267. *Id.*

268. *Id.* at 200.

269. López Linaldi, *supra* note 234, at 6.

270. *Id.*

Telecommunications, and section 5(b) of the GATS Annex on Telecommunications.²⁷¹ Finally, the Panel suggested that Mexico conform to its commitments under GATS and asked the Dispute Settlement Body to request that Mexico abide by its obligations.²⁷² As a result of the WTO Panel decision, Cofetel instituted the International Telecommunications Rules²⁷³ on August 11, 2004 to replace the previous ILD Rules and to demonstrate to the international community that Mexico was adhering to the WTO's suggestions.²⁷⁴

X. CONCLUSION

Overall, the WTO Panel was a waking call to Mexico, demonstrating how far-reaching and out of control Telmex's monopoly had become, causing a strain on an important bi-lateral relationship. Yet, Mexico continued to defend the telecommunications giant in light of clear signs of monopolistic and anti-competitive practices displayed on a world stage such as the WTO.²⁷⁵ In addition, Mexico's blatant approbation of Telmex's monopoly has affected its international reputation by frightening prospective investors from investing in the telecommunications industry in Mexico. Such a lack of investment has only worsened the problem by allowing the current monopoly to flourish.

Apart from causing international tensions and diminishing the appeal of investing in Mexico, Mexico's staunch backing of Telmex also undermines several important anti-competitive and telecommunication agencies, such as Cofeco and Cofetel, instituted to observe and check private entities from engaging in monopolistic and anti-competitive practices. Specifically, Cofetel has the potential to be a key regulatory agency that could possibly keep Telmex at bay with the aid of Cofeco, yet the SCT has continuously undermined Cofetel by regulating Cofetel decisions prior to implementation. Ultimately, Cofetel previewed its potential by establishing the International Telecommunication Rules on August 11, 2004 replacing the previous ILD Rules after the WTO Panel decision.

In addition, Cofeco has also established its potential as an important regulatory agency by imposing a \$1 billion fine on Telcel for charging competitors a higher interconnection fee. Unfortunately, Telmex's political clout allowed Telcel to remain unscathed as the fine was overturned in return for Telcel agreeing to abide by five pledges which included lowering interconnection fees and dropping a current lawsuit. The fine was instituted because Iusacell was tired of Telcel dominating the mobile phone industry. Thus, it will be interesting to observe how Iusacell will

271. Panel Report, *supra* note 10, at 224-225.

272. *Id.* at 225.

273. See generally *Reglas de Telecomunicaciones Internacionales* [Rules of International Telecommunications], *as amended*, Diario Oficial de la Federación [DO], 15 de Junio de 2004 (Mex.).

274. Oliver Solano, et al., *supra* note 106, at 544.

275. *WTO Rules Against Telmex*, L.A. TIMES (Apr. 3, 2004) <http://articles.latimes.com/2004/apr/03/business/fi-telmex3>.

continue to challenge the Telmex monopoly especially considering the recent merger between Iusacell and Televisa, Telmex's counterpart in the television industry. Only time will tell if Slim's monopoly will fall prey to competition or continue to flourish.

Updates

